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Adecco USA, Inc. and Michele Mims Case 13-CA-175962

October 4, 2018

DECISION AND ORDER REMANDING¹

**BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL**

Pursuant to a charge filed by Michele Mims on May 10, 2016, and amended September 9, 2016, the General Counsel issued a complaint on September 20, 2016. The complaint alleges that, since at least July 30, 2015, the Respondent has promulgated, maintained, and enforced its Dispute Resolution and Arbitration Agreement for Consultants/Associates (the Agreement), in violation of Section 8(a)(1) of the National Labor Relations Act. The complaint further alleges that the Agreement includes an overbroad work rule prohibiting or restricting employee access to the Board in violation of Section 8(a)(1). On November 2, 2016, the General Counsel filed a motion to transfer case to the Board and for Summary Judgment.

On November 4, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On November 18, 2016, the Respondent filed a response.

1. Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S.Ct. at 1619, 1632. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the Dispute Resolution and

Arbitration Agreement for Consultants/Associates is unlawful based on *Murphy Oil* must be dismissed.

2. There remains the separate issue whether the Agreement independently violates Section 8(a)(1) of the Act because it prohibits or restricts employee access to the Board. When the General Counsel filed its pending motion, the issue whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would be resolved based on the “reasonably construe” prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154, in which it overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. Under the standard announced in *Boeing*, the General Counsel’s motion does not establish that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to this complaint allegation.

Accordingly, we deny without prejudice the Motion for Summary Judgment with respect to this complaint allegation, and we will remand this proceeding to the Regional Director for Region 13 for further action as he deems appropriate.

ORDER

The complaint allegation that the promulgation, maintenance, and enforcement of the Dispute Resolution and Arbitration Agreement for Consultants/Associates unlawfully restricts employees’ statutory rights to pursue class or collective actions is dismissed.

IT IS FURTHER ORDERED that the General Counsel’s Motion for Summary Judgment is denied without prejudice in all other respects, and these proceedings are remanded to the Regional Director for Region 13 for further appropriate action.

Dated, Washington, D.C. October 4, 2018

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.